IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16643 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ANILKUMAR HASMUKHLAL JAISWAL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 16643 of 2003

MR SUNIL S JOSHI for Petitioner No. 1

MS PAURAMI SHETH Ld. AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE N.G.NANDI

Date of decision: 13/02/2004

ORAL JUDGEMENT

1. Heard Mr.H.R.Prajapati, learned advocate for the petitioner and Ms.Paurami Sheth, learned AGP for the respondents.

Ms. Paurami Sheth, learned AGP has placed on

record the affidavit in reply on behalf of respondent no.2 and Mr.Prajapati, learned advocate for the petitioner has placed on record the affidavit in rejoinder. Same are also kept on record.

2. In this petition under Article 226 of the Constitution of India, the petitioner has been challenging the order of detention dated 7.8.2003 (Annexure-A1) passed under Section 3 of the Gujarat Prevention of Anti-Social Activities Act,1985 (hereinafter referred to as "the PASA Act") by respondent no.2 and prays for quashing and setting aside of the said detention order setting the petitioner at liberty.

3. The grounds of detention dated 7.8.2003 (Annexure-B) suggests that two cases under Section 66(1)B, 65A, 81, 83, 116(B) of the Bombay Prohibition Act came to be registered on 8.5.2003 and 30.5.2003 respectively against the petitioner. The grounds of detention alleges the petitioner to be a "bootlegger", also stating that besides the registered cases, there are unregistered cases against the petitioner wherein the witnesses have apprehended fear to their person and property because of the criminal and anti-social activities indulged into by the petitioner and therefore, not willing to come forward in public giving complaint or statement. With this, witnesses requested the detaining authority to withhold their identity including their business. In the grounds (Annexure-B), the detaining authority has recorded satisfaction to the effect that the apprehension expressed by the witnesses was found to be true and therefore, resorting to Section 9(2) of the PASA Act, the identity of the witnesses have been withheld.

4. It is submitted by Mr.Prajapati, learned advocate for the petitioner challenging the detention order that the requirements for exercising the privilege under Section 9(2) of the PASA Act are not satisfied, and that the detaining authority is not justified in withholding the indentity of the witnesses invoking Section 9(2) of the PASA Act.

The detention order is also challenged on the count that the detaining authority delayed in passing the impugned order of detention. It is suggested from the record that the sponsoring authority sent the papers on 29.7.2003 and the detaining authority verified the statements of the witnesses on 5.8.2003, and impugned detention order came to be passed on 7.8.2003. As far as these dates are concerned, there is no disagreement over

the same by the learned AGP as well as the learned advocate for the petitioner, and that the statements of the witnesses in unregistered cases were recorded on 1.7.2003 and 11.7.2003 by the police officer concerned.

5. It is submitted that the statements of the witness recorded on 11.7.2003 at Page-56 of the paper book has been verified at Page-59 by the District Magistrate, Dahod i.e. Detaining Authority. The English translation of the same reads as under :

"Witness has remained present before me today. The statement given before Police Sub-Inspector, Baria and the Addl.Dy.S.P., Limkheda against the accused - Anilkumar Hasmukhlal Jaiswal is correct and the witness admits to have given correct statement before PSI, Baria and the Addl. Dy.S.P., Limkheda and is correct. That the accused is a bootlegger, head strong and of vindictive nature, and that the witness has apprehension from the accused".

6. English translation of the verification at Page.63 by the detaining authority as regards the statements of the witnesses recorded on 1.7.2003 reads as follows :-

"Today, the witness is present before me and admits to have given correct statement before PSI, Baria and Dy.S.P., Limkheda against the accused - Anilkumar Hasmukhlal Jaiswal, who is also stated to be a head strong, bootlegger and continuous to indulge in the same activities today also."

7. The English translation of the verification at Page.67 of the statement of the witness recorded on 15.7.2003 is identical to the verification Page.63 in respect of the statement of the witnesses recorded on 1.7.2003.

It is also seen from the above that the verification by the District Magistrate discloses that the witnesses, who appeared before him, was the same person who gave statement on 1.7.2003, 11.7.2003 and 15.7.2003, and that the accused is a head strong person and a bootlegger, and that the contents of the statement given on the aforesaid dates are true and correct, and that the witnesses have apprehension from the accused.

8. In the case of Chandrakant N. Patel Vs. State

of Gujarat & Others, 1994 (1) GLR 761, the Full Bench of this High Court observed that, ".... If the disclosure of the particulars and materials and the sources from which they are obtained is not to be made known on the ground of promise of confidentiality made to the informant in view of his apprehension that he would be visited with dire consequences if the detenu came to know that he was the source from which the particulars and materials were gathered, the detaining authority must be fully satisfied that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. The general background, character, antecedent, criminal tendency or propensity, etc. of the detenu and such of those matters as are relevant in the context of the informent must be inquired into and carefully examined by the detaining authority with a view to satisfying itself that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the informant, inter alia, to protect himself against the falsity, of his version being exposed by an effective explanation of the detenu or to hide his own involvement or to conceal his enmity with the detenu. The detaining authority must be further satisfied that the promise of protection against the reprisal would not be an effective substitute for the promise of confidentiality and that unless confidentiality is guaranteed, material information would not come forth making it impossible to exercise the power of detention. ..... In a case where a person is detained by way of preventive action, it is the liberty of an individual detenu which is involved and in that sense, it can be said that it is a matter of private interest and not public interest. But the right of the person so detained is recognised as a fundamental right by the Constitution and taking away of such right can only be in public interest. Adversely affecting liberty and such a right, therefore, can properly be regarded as a mater of public interest. We are, therefore, of the opinion that there is no inconsistency between the ratio of the division bench decision in the case of Balkrishna and the ratio of the decision of the division bench in the case of Bai Amina. We are also of the opinion that even otherwise also, it cannot be said that Bai Amina's case does not lay down good law. .... But if, after considering the general background, character, antecedent, criminal tendency or propensity, etc., of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining authority is satisfied about the necessity of withholding some particulars and materials, then it cannot be said that the same was not done in public interest, and that the

public interest likely to be subversed by non-disclosure did not outweigh or override the public interest intended to be served by disclosure of the relevant particulars and materials to the detenu."

9. It is submitted by learned AGP that the statements of the witnesses verified by the detaining authority, as above, disclose the general background, character, antecedents, criminal tendency or propensity of the detenu and also the reluctance of the witnesses to disclose their identity.

10. As far as the statements recorded on 1.7.2003, 11.7.2003 are concerned, the same suggest that the petitioner has been indulging in the criminal acts and dealing in the sale of liquor and involved in many cases, and also the apprehension expressed by the witnesses.

In the case of Ranubhai Bhikhabhai Bharwad (Vekaria) Vs. State of Gujarat & Others, 2000 (3) GLR 2996 while considering the invoking of Section 9(2) of the PASA Act, the learned Single Judge in Para.8 has observed that, "merely because the witnesses were summoned and it is recorded that he had made such statement, that does not mean verification of the statements. What is to be verified is the veracity of the allegations levelled in such cases and with regard to a particular incident, it has to be verified. It is only after following such a process that the detaining authority can come to a subjective satisfaction about the correctness of the incident and to hold that all the witnesses were genuine and that the privilege under Section 9(2) was required to be taken and that it was not in public interest to disclose the names of witnesses who were not coming in open to depose against the petitioner out of fear. That identical situation had come up before this Court in the case of Kalidas C. Kahar Vs. State of Gujarat & Others, reported in 1993 (2) GLR 1659 dealing with Section 9(2) of the Act, the Division Bench in Para.9 has observed that, "at the time of exercising the privilege under Section 9(2) of PASA balance is required to be struck between the public interest on one hand and the right of the detenu to make a representation under Article 22(5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid

facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under Section 9(2) carved out on the basis of Article 22 (5) of the Constitution which provides that nothing in Subsection (1) shall require the authority making such order to disclose facts which it considers to be against the public order to disclose. The Division Bench has held that it is the duty of the detaining authority to strike a balance as stated above, that in public interest the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under Section (2) PASA. The Division Bench found in the facts and circumstances of the case before it that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under Section 9(2), as the proposal was made on 16.10.1992 and the order of detention was passed on the following day, i.e. 17.10.1992 nor is there any material to show as to how he examined the necessity of exercising the power under Section 9(2). Under the circumstances, the Division Bench held that it was a wrong exercise of power under Section 9(2) which has affected the detenu's right of making an effective representation under Article 22(5) of the Constitution of India, and therefore, the continued detention of the detenu is bad and illegal and impugned detention order was bad and illegal."

11. The verification of the statement referred to above only suggests about the general background of the person and as alleged the petitioner has been indulging in the sale of liquor. As far as the incident is concerned, there is nothing to suggest that there was any subjective satisfaction reached so far as the incidents in general for which the witnesses have given the statements. Except the say of the witnesses, there is absolutely no other material which appears to have been considered by the detaining authority for the purpose of recording subjective satisfaction for invoking Section 9(2) of the PASA Act.

In the case of Kishor Nagjibhai Parmar Vs. State of Gujarat & Others, reported in 2000(4) GLR 3236 considering the various decisions on the subject, it has

been held by the learned Single Judge that a mere statement about having verified the veracity, genuineness and correctness of the fear expressed by the witnesses, under such circumstances, can be of no virtue in absence of contemporaneous material and the detention order stands vitiated for want of proper exercise of powers under Section 9(2) of the PASA Act, and resultant infringement of the constitutional right of the detenu of making effective representation due to non-disclosure of the names of the witnesses.

12. In the instant case, there is no contemporaneous material considered by the detaining authority for exercising the power under Section 9(2) of the PASA Act. All what appears from the verification by the detaining authority is that it had summoned the witnesses and the witnesses admitted the correctness of the statements given by them, and also expressing their apprehension from the petitioner. What is further required to be verified is the veracity of the allegations levelled in such cases with regard to a particular incident which is to be verified. This process has not been followed in the instant case inasmuch as all what the witnesses have said is generally not referring to any particular incident. There is no verification of the veracity of any particular incident for want of same having been mentioned in the statement of the witnesses.

13. Under the circumstances, in my opinion, the requirement of Section 9(2) of the PASA Act cannot be said to have been complied with in the instant case and therefore, the detention order stands vitiated for want of proper exercise of power under Section 9(2) of the PASA Act and the resultant infringement of the constitutional right of the detenu of making effective representation.

14. Since the petition is being decided on the question of proper exercise of powers under Section 9(2) of the PASA Act and thereby, compliance with the same, I do not regard it necessary to go into the question of delay in passing the detention order and other contentions raised by the petitioner.

15. In the result, the petition is granted and accordingly allowed. The impugned order of detention dated 7.8.2003 (Annexure-A1) passed by respondent no.2 against the petitioner -detenu -Anilkumar Hasmukhlal Jaiswal is hereby quashed and set aside. The petitioner detenu is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute

accordingly. Direct service is permitted.

(N.G.Nandi,J.)

(vipul)